IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1328

WANDA JUNE WEEKS, *Appellant,*

v.

THOMAS S. KLEPPE, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; LAWRENCE SNAKE; and CHARLES TAYLOR, *Appellees,*

and

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, *Appellants,*

v.

THOMAS S. KLEPPE, individually and in his capacity as Secretary of the Interior of the United States of America, *Appellee,*

THE DELAWARE TRIBE OF INDIANS, *Intervenor.*

On Appeal from the United States District Court for the Western District of Oklahoma

MOTION OF DELAWARE TRIBAL BUSINESS COMMITTEE, NAMED MEMBERS THEREOF, AND INTERVENOR DELAWARE TRIBE OF INDIANS TO AFFIRM IN PART

(List of Counsel on Inside Cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

GEORGE B. CHRISTENSEN, ESQ.
Suite 5000
One First National Plaza
Chicago, Illinois 60603

JOSEPH FONTANA, ESQ.
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

BRUCE MILLER TOWNSEND, ESQ.
201 Denver Building
7th & Denver
Tulsa, Oklahoma 74119

(Counsel for These Appellees)

Of Counsel:

WINSTON & STRAWN
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Suite 5000
One First National Plaza
Chicago, Illinois 60603

TABLE OF AUTHORITIES

CASES: Page

Absentee Delaware Tribe of Oklahoma v. *United States*, 5 Ind. Cl. Comm. 491 (1957) 7

Absentee Delaware Tribe of Oklahoma v. *United States*, 9 Ind. Cl. Comm. 346 (1961) 6

Cherokee Nation v. *Journeycake*, 155 U.S. 196 (1894) . 8

Delaware Indians v. *Cherokee Nation*, 193 U.S. 127 (1904) 7, 8

Delaware Tribe of Indians v. *United States*, 2 Ind. Cl. Comm. 253 (1952) 5

Delaware Tribe of Indians v. *United States*, 2 Ind. Cl. Comm. 536 (1954) 6

Delaware Tribe of Indians v. *United States*, 128 F. Supp. 391 (Ct. Cl. 1955) 6

Delaware Tribe of Indians v. *United States*, 21 Ind. Cl. Comm. 344 (1969) 6

Morton v. *Mancari*, 417 U.S. 535 (1974) 4

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 5

STATUTES:

Act of April 21, 1905, § 21, 33 Stat. 222 6

25 U.S.C. §§ 70s(b), (c) and 70u(a) (1970) 7

25 U.S.C. §§ 1181-86 (1970) 2

25 U.S.C. §§ 1291-97 (Supp. IV, 1974) 2

MISCELLANEOUS:

FED. R. CIV. P. 52(a) 5

H.R. REP. No. 2693, 79th Cong., 2d Sess. (1946) 7

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MOTION TO AFFIRM IN PART

Appellees, The Delaware Tribal Business Committee, Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine, and Y. A. Scott, and Intervenor, The Delaware Tribe of Indians, appellants in connected Case No. 75-1301, pursuant to Rule 16 of the Rules of this Court, move to affirm the Judgment below insofar as it decrees that Pub. L. 90-508, 82 Stat. 861, 25 U.S.C. §§ 1181-86 (1970), is constitutional and denies appellants the relief they prayed, Jurisdictional Statement, app. A, p. 3, para. 2, and insofar as it decrees that Pub. L. 92-456, 86 Stat. 762, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), is valid insofar as it provides for the inclusion of the Cherokee Delaware class and the Absentee Delaware class in the distribution to satisfy Indian Claims Commission awards in Dockets 72 and 298, *id.* at para. 3 to its first semicolon, on the ground that it is manifest that the questions on which decision of this appeal depend are so insubstantial as not to warrant further argument.

Appellants are descendants of 21 adult and 49 minor Delawares, Jurisdictional Statement, app. B, p. 14, who, by the terms of the 1866 Treaty with the Delaware Indian Tribe renounced citizenship in the tribe and became, as are their descendants, citizens solely of the United States. They number approximately 700 persons. The tribal Indians whom they oppose, the Delaware Tribe of Indians ("Cherokee Delawares") and the Absentee Delaware Tribe of Western Oklahoma, number approximately 7,765 and 1,808 persons, respectively. The two statutes, 25 U.S.C. §§ 1181-86 (1970) and 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), distributing congressional appropriations to honor awards of the Indian Claims Commission are for wrongs done to the Dela-

ware Tribe in 1818 and 1854, respectively. The first award (Docket 337) is for $1.62 million, plus interest; the second (Dockets 72 and 298) is for $9.17 million, plus interest.

The purpose of this appeal is to obtain rulings by this Court that the *only* beneficiaries of the $9.17 million award with respect to the 1854 wrong shall be the appellants, citizens solely of the United States, as have been their ancestors since 1866; secondly, that while they may participate in the $1.62 million award for the 1818 wrong, the 7,765 Cherokee Delawares may not.[1]

The brazen, unsavory propositions advanced on behalf of the so-called Kansas Delawares were fully examined below and rejected by a unanimous court. Jurisdictional Statement, app. B, pp. 55-62.

Manifestly, it scarcely would right a wrong done to an Indian tribe to give $9.61 million to citizens solely of the United States, tribal expatriates for 110 years, while the smallest Indian tribal group (but over twice as large as the U.S. citizen group) received but $1.17 million and by far the largest Indian tribal group was turned out of court entirely uncompensated after 25 years of successful litigation of treaty violations now conceded

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[1] As we roughly compute it, elimination of the Cherokee Delawares from participation in the $1.62 million award would increase the so-called Kansas Delawares participation therein from about 6.8 percent to approximately 28 percent, or about $454,000. Under their contentions, then, these Indian and tribal expatriates would take *all* of the $9.17 million award and $454,000 of the $1.62 million award for a total of about $9.62 million, leaving approximately $1.17 million (or less because of other factors not relevant here), for the Absentee Delaware Tribe or its tribal members on a *per capita* basis—*nothing for the Delaware Tribe of Indians or its members.*

by the United States. The Constitution neither authorizes nor requires such an absurdity or mockery of the purpose of the Indian Claims Commission Act.

This Court recently approved, in the face of a constitutional challenge, a congressional policy of preference for tribal Indians in the hiring and promotion practices of the Bureau of Indian Affairs and recognized as proper legislation "on behalf of federally-recognized Indian Tribes." *Morton* v. *Mancari*, 417 U.S. 535, 551-55, and n.24 (1974). There seems scant likelihood that the Court is going to reverse field and deny, for the benefit of non-Indians, reimbursement to tribal Indians who have maintained and cherished their tribal membership.

Unless the Court feels there is a reasonable prospect that it could be persuaded to adopt appellants' unconscionable proposition and reverse the unanimous opinion below there is nothing to be gained by a detailed, time-consuming, and costly examination of the exceedingly attenuated arguments advanced for the Kansas Delawares' appeal.

Moreover, appellants' arguments can be stated only by subtly placing an unwarranted gloss upon the facts found by the District Court and by rearguing facts not so found. The appeal is taken against these appellees simply to contend that there is no rational basis for including members of the Delaware Tribe of Indians in the compensation for wrongs done to that tribe in 1818 and in 1854 because the Delaware tribe "dissolved" and vanished by the terms of the 1867 agreement with the Cherokees.

Appellants rely in the fabrication of their argument on facts not found by the District Court and rejection of

facts found controlling by the lower court. This Court, we submit, does not sit for the purpose of *de novo* factual review. "Findings of fact shall not be set aside unless clearly erroneous", FED.R.CIV.P. 52(a); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), but appellants make no pretense that the District Court has committed factual error. The factual basis for recognition of the rights of the Delaware Tribe to these claims awards is translucently clear on the record. The Indian Claims Commission recognized "The Delaware Tribe of Indians" and "The Absentee Delaware Tribe of Western Oklahoma" and their rights to pursue the claims at issue.[2] The distribution statute

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[2] In Indian Claims Commission Dockets 27A and 241 the same Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma pursued claims based on the same 1854 treaty involved in the appeal herein. The United States challenged the rights of both groups to pursue the claims of the Delaware Nation. 2 Ind.Cl. Comm. 253 (1952). The rights of the two tribes were upheld. In Finding No. 8, the Commission stated:

> The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation, but they and their descendants . . . maintained group identity, receiving annual payments from their own tribal funds, having tribal chiefs and groups and business committees continuously until the present time, and at this time. *Id.* at 260.

The Commission, in its Opinion, further elaborated on Finding No. 8:

> It is undisputed that the main body of the Delawares and the group with whom the [United States] dealt as representing the Delaware Nation following the treaty of September 24, 1829, removed to the reservation ceded to the Delawares in Kansas, and that following the agreement of April 8, 1867, this group removed to the Cherokee Territory and its members, or most of them, became incorporated and merged for many purposes with the Cherokees. Nevertheless, this incorporation and merger did not result in the destruction of the continued activities of those so incorporated with the Cherokees as a dis-

for Dockets 72 and 298 does the same. Jurisdictional Statement, app. H, p. 103. These recent acts represent a continuation of the long legal tradition of congressional and executive involvement with the Cherokee Delawares as a distinct tribal entity.[3]

The District Court found:

> The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation, but they and their descendants maintained group identity. Jurisdictional Statement, app. B, pp. 15-16.

> tinct identity. They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments for many years from their own tribal funds, separate from the Cherokees. They had separate tribal funds in the hands of the U.S. as late as 1906. They were governed by hereditary tribal chiefs until the death of Charles Journeycake in 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group. *Id.* at 265.

The Commission's findings was affirmed by the Court of Claims, *Delaware Tribe of Indians* v. *United States*, 128 F.Supp. 391, 398 (Ct. Cl. 1955), and became the basis of the subsequent Commission awards to the Delawares in Dockets 337 and 72 and 298. *Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind.Cl.Comm. 346 (1961) (Docket 337); *Delaware Tribe of Indians* v. *United States*, 21 Ind.Cl.Comm. 344, 345, 350 (1969) (Dockets 72 and 298).

[3] For example, Section 21 of the Act of April 21, 1905, 33 Stat. 222, authorized the Secretary of the Treasury to pay $150,000 as a claims settlement to "the Delaware Tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . . ." The amount appropriated was credited to the Delaware Tribe by treasury warrant and was disbursed in per capita payments to members of the tribe annually from 1906 to 1923, inclusive. *Delaware Tribe of Indians* v. *United States*, 2 Ind.Cl.Comm. 536, 547-48 (1954) (Finding of Fact. No. 13).

And in its footnote 12, the Court found:

> We are unable to agree with the Kansas Delawares' contention, and find that the Cherokee Delawares have maintained group identity, having tribal chiefs and business committees continuously until the present time. *Id.* at p. 16.[4]

There can be no question of the weight and import of the court's finding, based as it is upon a final finding of fact of the Indian Claims Commission reviewed and affirmed by the Court of Claims. Such findings are intended by Congress to be conclusive and binding on Congress in the distribution of Indian Claims judgments. 25 U.S.C. §§ 70s(b), (c) and 70u(a) (1970); H.R.REP. No. 2693, 79th Cong., 2d Sess. 8 (1946).

The theory of Delaware tribal dissolution is not structured on fact nor is it supportable in law. Appellants concede there exists no legal precedent for the theory. Jurisdictional Statement, p. 32.[5] This Court affirmed

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[4] The District Court's findings were based on Findings of Fact No. 49 and 50 in Docket 337. *Id.* at p. 16. These findings, 5 Ind. Cl.Comm. 491-92 (1957), were in turn based on the petitioner's evidence in Docket 27A, and Finding No. 50 quotes directly the language and substance of Finding No. 8 in Dockets 27A and 241. *See* note 2, *supra.*

[5] Appellants rely for their primary support in law on the decision of this Court in *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), in which it was stated that the children of those Delawares who purchased Cherokee citizenship were native-blood Cherokees and "had all of the rights of Cherokee citizens 'and no more.'" *Id.* at 138; Jurisdictional Statement, pp. 15-16, 32, 35. They conclude that by this language the Court meant that the children in question had lost all rights as Delawares and that the Delaware tribe in fact had ceased to exist.

This construction is patently unfounded. The case involved adjudication of the land rights of the Delawares as against the

the existence of distinct Delaware tribal rights when it stated in 1894 that the Delawares had the right to maintain tribal trust funds separate from the national fund of the Cherokees for the benefit of Delaware people. *Cherokee Nation* v. *Journeycake,* 155 U.S. 196, 213 (1894).

In sum: the Kansas Delawares seek a plenary hearing looking to an end result we seriously doubt this Court will ever reach, no matter how many briefs be filed or arguments heard—the preference of United States citizens whose ancestors renounced Indian citizenship to the exclusion of tribal Indians in the recompense of treaty wrongs to the tribe. Appellants seek to reach that shocking result in substantial part by contradicting findings of fact on which the District Court was unanimous.

Since the relief and the issues presented by the instant appeal are distinct and severable from those which these appellees have raised as appellants in case 75-1301 and representatives of the Absentee Delaware Tribe have raised in case 75-1335, appellants' suggestion that jurisdiction should be noted here if it is noted in either or both of those cases is without merit. We respectfully pray that the judgment of the District Court be affirmed in the respects specified in the opening of this motion.

Cherokee Nation and had nothing whatsoever to do with the determination of either Delaware treaty rights against the United States or tribal existence. The Court simply held that the Delawares purchased the same rights to land, *i.e.*, a right of use and occupancy, not fee title, as were accorded individual Cherokees under their tribal constitution. 193 U.S. at 137-38. The Delawares had the same rights in land as the Cherokees—*and no more.*

Respectfully submitted,

GEORGE B. CHRISTENSEN, ESQ.
Suite 5000
One First National Plaza
Chicago, Illinois 60603

JOSEPH FONTANA, ESQ.
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

BRUCE MILLER TOWNSEND, ESQ.
201 Denver Building
7th & Denver
Tulsa, Oklahoma 74119

(Counsel for These Appellees)

Of Counsel:

WINSTON & STRAWN
Suite 1040
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Suite 5000
One First National Plaza
Chicago, Illinois 60603